No. 1

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, AND HAROLD E. SULLIVAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

CITATIONS

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OPINIONS BELOW

The opinion of Judge Nordbye[1] denying respondents' motion to suppress evidence (R. 3242–47) has not been reported. The majority and dissenting opinions of the Court of Appeals (R. 3339–60) are reported at 225 F. 2d 394.

JURISDICTION

The judgments of the Court of Appeals were entered on June 15, 1955 (R. 3361–64), and a petition for rehearing, timely filed, was denied on August 18,

[1] Judge Nordbye, District Judge for the District of Minnesota, was specially appointed by Chief Justice Vinson to try this case in the Northern District of Illinois. (R. 116–117.)

1955 (R. 3365). On September 16, 1955, by order of Mr. Justice Reed, the time for filing a petition for certiorari on behalf of the United States was extended to and including October 17, 1955. (R. 3365.) The Government's petition for certiorari was filed on October 17, 1955. Respondents filed a conditional cross-petition for certiorari. On June 11, 1956, this Court entered an order (R. 3366) granting the motion of the Solicitor General to defer consideration of the petitions for writs of certiorari. Thereafter, the Government filed a motion to remand, later amended and supplemented, to which respondents filed answers. Following this, respondent Huebner moved to withdraw from the conditional cross-petition for certiorari and from opposition to the Government's petition for certiorari, consenting in addition to the motion to remand. This Court denied the respondents' cross-petition, granted respondent Huebner's motions, and granted the Government's petition for certiorari, "limited to the issues raised in the amended motion to remand and supplement thereto and the respondents' answer to the amended motion to remand." (352 U. S. 997–998.) The jurisdiction of this Court rests upon 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether, in the present posture of the case and in view of the unusual circumstances involved, the interests of justice would be served by vacating the judgments of the Court of Appeals and remanding the case to the district court with directions to take further evidence and make supplementary findings on the issues raised by respondents' pre-trial motion to suppress evidence.

STATUTE INVOLVED

28 U. S. C., SEC. 2106. *Determination*

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT

On March 14, 1952, an indictment in two counts was returned in the United States District Court for the Northern District of Illinois charging respondent Shotwell Manufacturing Company, a corporation, and respondents Cain, Sullivan and Huebner as officers thereof, with wilful attempted evasion of a large part of the corporation's income tax for each of the years 1945 and 1946, by filing false and fraudulent corporate income tax returns, in violation of Section 145 (b) of the Internal Revenue Code of 1939. (R. 4–7.) The amounts of the corporation's reported and correct net income and tax liability as alleged in the indictment were as follows:

Year	Reported		Correct	
	Income	Tax	Income	Tax
1945	$561,064	$370,638	$738,210	$534,288
1946	1,202,917	457,012	1,526,400	579,970

As set forth in the bill of particulars (R. 8–9), the unreported income consisted of premium payments received by the corporation in excess of the recorded invoice and O. P. A. ceiling prices and payments received for wholly unrecorded sales. After a jury trial which lasted five weeks, respondents were found guilty as charged. (R. 2990.) The corporation was fined $10,000 on each count. The individual respondents were sentenced to imprisonment for three years on each count, the sentences to run concurrently, and were fined varying amounts. (R. 3012, 3015–16, 3018–19, 3075, 3221–24, 3256–57.)

The Court of Appeals, with Judge Lindley dissenting, reversed on the ground that the trial court erred in denying respondents' pre-trial motion to suppress evidence, and it remanded the case for a new trial with instructions to sustain the motion.[2] (R. 3361–64.) A petition for rehearing was denied (R. 3365), and the Government petitioned this Court for a writ of certiorari.[3]

After the petition for certiorari had been filed, the Department of Justice received information from the Internal Revenue Service to the effect that an investigation then in progress indicated that perjured testimony relevant to the issues raised by the motion to suppress had been given at the hearing on the motion and at the trial. (See Appendix, *infra*, pp. 40–46, for a chronological statement of the history of this

[2] In view of this determination, the majority found it unnecessary to consider other errors alleged by respondents.

[3] Respondents filed a conditional cross-petition for writ of certiorari on Oct. 17, 1955.

litigation.) The Solicitor General immediately advised this Court of the receipt of such information[4] and thereafter filed in this Court a motion, later amended and supplemented, to remand the case to the district court for the taking of further evidence. Respondents filed an answer opposing the motion. Thereafter, respondent Huebner filed and this Court granted (352 U. S. 997) a motion to withdraw from opposition to the Government's petition for writ of certiorari, and at the same time, Huebner consented to the motion to remand. This Court granted the Government's petition for writ of certiorari "limited to the issues raised in the amended motion to remand and supplement thereto and the respondents' answer to the amended motion to remand." (R. 3367.)

I

THE MOTION TO SUPPRESS EVIDENCE

A. THE VOLUNTARY DISCLOSURE POLICY

Respondents' pre-trial motion to suppress was predicated on the contention that there had been a voluntary disclosure to the Treasury Department at a time when the policy of that Department was to grant immunity from criminal prosecution to taxpayers making such disclosures. (R. 120–127, 144–145.) This so-called "voluntary disclosure policy" was publicly announced in 1945 and was withdrawn in January 1952. (R. 3125–26, 3142.) The policy provided generally that, in cases in which taxpayers made voluntary disclosures of intentional evasions before an in-

[4] Letter to Harold B. Willey, Esq., dated Dec. 6, 1955.

vestigation had been begun, the Treasury Department would assess the tax deficiency plus civil penalties, including the 50% fraud penalty, but would not refer the case to the Department of Justice for criminal prosecution. (R. 3136–37.) In the two most definitive pronouncements of Treasury Department officials on the subject, it was stated that taxpayers must cut "square corners" with the Government (R. 3140), and that the voluntary disclosure policy assumed "that the repentant taxpayer cooperates with agents of the Bureau in determining the true tax liability." (R. 3141.) These two statements, one by J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, the other by Secretary of the Treasury Snyder, were issued in May 1947.[5] (R. 3132–40.)

B. THE ALLEGATIONS OF THE MOTION

Respondents' motion (R. 120–127), as amended (R. 144–145), alleged in substance that, in reliance on the voluntary disclosure policy and before any investigation had been initiated, respondents came forward and made such a disclosure with respect to the tax returns of the corporation for the years covered by the indictment. Respondents alleged that they had informed a Treasury official that receipts from black market transactions had not been recorded on the corporation's books or reported in its tax returns and that these receipts in turn had been expended by the corporation for over-ceiling price purchases of raw materials which purchases were likewise not recorded

[5] The statements of Treasury officials on the voluntary disclosure policy appear in the record at pp. 3103–53.

on the books or reflected in the tax returns, with the result that no actual gain was realized from the black market transactions. Further, respondents asserted that the matter was brought to the attention of the Treasury Department since its then legal position was that expenditures for materials in excess of O. P. A. ceiling prices could not be included in cost of goods sold for the purpose of determining taxable income,[6] so that, under the Treasury Department's interpretation of the law, the corporation owed additional taxes for those years; and that after Treasury officials had acknowledged the sufficiency and timeliness of this disclosure, respondents made available to Treasury agents the books and records of the corporation and communicated information not reflected in those records material to the "omissions and misstatements" in the corporate returns and otherwise cooperated with the examining agents to the utmost of their ability. The motion prayed for the suppression of all evidence obtained from respondents subsequent to this disclosure on the grounds (R. 123)—

> that the actions aforesaid of the Bureau of Internal Revenue constituted an improper inducement of a confession or admission of facts upon which a criminal prosecution might be based and an illegal search and seizure of the books, papers and records of the [respondents], and

[6] This question was then pending before the courts. In December 1948 The Tax Court overruled the Commissioner and held such deductions allowable (*Sullenger* v. *Commissioner*, 11 T. C. 1076), and this was followed by a number of decisions to the same effect in the courts of appeals. (R. 144–145, 427–428.) The Commissioner acquiesced in these decisions shortly prior to the trial of this case. (R. 428.)

> that, in consequence, the admission in evidence of all books, records, papers and statements so obtained, and any copies thereof or data procured therefrom as a result of information obtained therefrom would violate the rights of the [respondents] * * * under the Fourth and Fifth Amendments to the Constitution * * *

and on the further ground (R. 145)—

> that even if the said disclosure was insufficient or entirely, [*sic*, should be untimely] or both, [petitioner], by reason of the premises, is estopped from so asserting, and * * * [respondents] are, nevertheless, entitled to the relief by this motion requested.

Affidavits were submitted in support of the motion by respondent Cain (R. 127–132) and by Leon J. Busby, an accountant engaged by respondents (R. 18–24).

After a three-day hearing, at which eleven witnesses testified including respondent Cain (R. 150–448), the motion was denied. The evidence at the hearing was in sharp conflict on many points, and Judge Nordbye stated at the close that he felt it would be inappropriate to express his opinion as to the credibility of the witnesses and the good faith of respondents prior to trial, and he reserved the right to file a memorandum of findings of fact and conclusions of law upon completion of the trial. (R. 447-448.) This memorandum was later filed. (R. 3242–47.)

C. THE EVIDENCE

The evidence relating to the issues raised by the motion to suppress may be summarized as follows:[7]

At all times material hereto, respondent Shotwell Manufacturing Company was engaged in the manufacture and sale of candy and marshmallows. Its office and plant were located in Chicago, Illinois. The principal stockholders of the corporation were respondents Cain and Sullivan and their families.[8] Cain became president of the corporation prior to 1945. Sullivan, an attorney whose association with the corporation dates back to 1929, was general counsel, a director and, beginning in 1946, executive vice-president. Huebner, a long time employee of the corporation, was a vice-president and general manager in charge of plant operations; he owned less than one percent of the stock. (R. 747, 748, 1707, 1772, 1791, 2542, 2635, 2637, 2648.) Since 1942, the accounting firm of Busby and Oury performed accounting services for the corporation. (R. 168, 1820–1821.)

In the latter part of 1943, David G. Lubben, a candy dealer, offered to sell the corporation a large

[7] The summary includes the evidence presented both at the hearing on the motion to suppress and at the trial. In passing upon a ruling such as this, the reviewing court may properly consider the whole record, not merely the evidence adduced prior to the ruling. *Carroll* v. *United States*, 267 U. S. 132, 162; *Reid* v. *United States*, 209 F. 2d 893, 896 (C. A. 5th).

[8] In 1945, Cain and Sullivan and their families owned approximately 48 per cent of the corporation's stock which holdings were increased in 1946 to about 75 per cent. (R. 1793.)

quantity of scarce chocolate if he were appointed broker for the corporation's candies in the New York area, and an agreement to this effect was made. In August or September 1944, Huebner asked Lubben, who had been seeking increased shipments, if he would be willing to pay ten cents a pound in cash above the invoice price for bulk candy, the shipments to be invoiced at the prevailing O. P. A. ceiling price. Lubben readily agreed to this and, after Huebner conferred with Cain, the corporation began to ship Lubben large quantities of candy. (R. 792–797, 2055–2061, 2543–2544.) During 1945 and 1946, Lubben, in accordance with the agreement, personally made cash payments to Huebner, in excess of the invoice and O. P. A. ceiling prices, totaling more than $290,000. (R. 811–855, 864–876, 888–905, 910–933, 1417–1516, 1524–1534, 1538–1568, 1573–1577.) Other similar cash payments were made to Huebner by Lubben's employees, Heitman and Hankermyer (R. 876–892, 1369–1377, 1554), and by his brother-in-law, Moran (R. 1297–1303, 1309–1311). In one instance, Cain directed Lubben to pay $1,450 of the overages due the corporation to a Mrs. Krasne, in connection with the purchase of jewelry by Cain's wife. (R. 888–891, 1286–1288, 2628–2629.) The Government's expert witness at the trial testified that, upon the basis of the evidence before the jury, the over-ceiling cash receipts for the years 1945 and 1946 totaled $177,146, and $211,193 respectively. (R. 1838–1840, 1845–1846, 2064–2066.)

In addition to the above transactions, in which the invoice price was paid by check and only the overage

in cash, the corporation made a number of shipments to Lubben during 1946, referred to herein as "unbilled shipments," for which no invoice was made out and for which Lubben paid both the ceiling price and the overage to Huebner in cash. (R. 802–805, 953–962.) The unbilled shipments began in March 1946 after Huebner told Lubben that he could have a lot of merchandise on condition that he pay both the ceiling price and the overage in cash and accept shipment without an invoice. (R. 933–935.) The Government's expert witness testified at the trial that, on the basis of the evidence before the jury, the unbilled shipments in 1946 totaled $65,532. (R. 1845–1946.)

When Lubben made the aforementioned cash payments to Huebner, the latter invariably divided the money into three piles with the comment that one was for Cain, one for Sullivan and one for himself. (R. 827, 831, 837, 840, 903–904, 992–995.)

No part of the cash payments made by Lubben was recorded on the corporation's books or reported in its tax returns. (R. 1844–1846.) Certain informal records were kept by the corporation of the cash receipts and their disbursement during a part of the period in question. (R. 785, 1706, 1741–1742.) But when Busby prepared the corporation's tax returns for 1945 and 1946, he was given to understand that there had been no violation of O. P. A. regulations by the corporation and that all receipts and disbursements had been recorded in the corporation's books. (R. 1822–1825.)

During the period in which the cash payments were made by Lubben for merchandise received from the

corporation, both Cain and Sullivan had repeatedly impressed upon Lubben that the corporation was not reporting the cash receipts as income and that no record should be kept by Lubben of his cash payments. (R. 860–863, 920–922.) Although Lubben told Cain and Sullivan that he was not keeping any records of his cash payments, he did in fact make and retain a record of the payments (R. 866), and sometime around the end of January 1948, Lubben told Cain that he had a record of the over-ceiling and other cash payments.[9]

In January or February 1948,[10] Cain sent Busby and H. Stanley Grafflund, the corporation's comptroller, to Lubben's plant in Hillsdale, New Jersey, to examine Lubben's books in connection with a $50,000 loan which Lubben had requested from respondents. (R. 1757–1758.) Busby testified as a defense witness at the hearing on the motion and as a Government witness at the trial[11] that during this trip he learned for the first time, in the course of a conversation with Grafflund, that Lubben had made over-ceiling cash payments for merchandise received from the corporation. (R. 169–171, 1826–1829.) He testified further that immediately upon his return to Chicago, he discussed the matter with Cain and Sullivan who told him that all the black market receipts had been used

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[9] Lubben's own tax returns had been under investigation by the Treasury Department as early as November 1945. (R. 335; see also R. 1059–1061.)

[10] Busby and Grafflund placed this trip in January 1948 (R. 1757, 1825); Lubben placed it in February (R. 1207).

[11] Later in the trial he testified as a defense witness. (R. 2741.)

by the corporation for the purchase of raw materials; that no records had been kept of either the receipts or the expenditures because they did not wish to reveal violations of O. P. A. regulations; and that they had not reported the receipts as income because they considered the expenditures for black market purchases deductible and the whole series of transactions a "wash-out" taxwise. Upon hearing this, Busby allegedly told Cain and Sullivan that the Commissioner of Internal Revenue would not allow taxpayers to include in cost of goods sold payments above ceiling prices for the purchase of materials; that they had a tax problem; and that (R. 172) "if they made the disclosure which was in my opinion the thing to do and customary, there probably would be nothing to it except they would clear The Shotwell [*sic*] of omissions from the tax returns." (R. 170–172, 204–207, 209–211, 213–214, 1826–1832.). It was Busby's testimony that acting under instructions from Cain and Sullivan he went to the office of then Chief Deputy Collector of Internal Revenue Sauber about the middle of January 1948 and without revealing his clients' names discussed with Sauber the factual situation related to him by Cain and Sullivan; that Sauber advised him that (R. 175) "if the disclosure is timely and the facts that I had related to him were correct, he saw no reason why the immunity policy of the Bureau should not be applied in this particular matter"; and that on the following day at a meeting at which Cain, Sullivan and Huebner were present, he gave a report of his conversation with Sauber (R. 176). Further, that he was then instructed by Cain to (R. 177) "go in and

talk to the Collector's Office and disclose the whole affairs [*sic*], whole details as I have outlined it [*sic*] to you and get their instructions * * * as to how we should proceed"; and that within a few days he returned to Sauber's office, discussed the whole matter with Sauber and revealed the identity of the respondents. Sauber allegedly then told Busby that the disclosure was sufficient and timely but that the Internal Revenue Service would not allow deductions for over-ceiling purchases of raw materials and suggested that Busby prepare a summary of the corporation's over-the-ceiling receipts, adding that he would send an agent out to verify the results. (R. 175–181, 214–216, 251–252.) Cain allegedly accompanied Busby on a subsequent visit to Sauber in which the whole subject was discussed, and Cain told Sauber that, while the corporation was ready to pay any tax the Government claimed, it would at a later date probably contest the Commissioner's refusal to allow deductions for its over-the-ceiling expenditures. (R. 230–232, 251–253, 1948)

It was the testimony of both Cain and Busby that, after the initial meetings with Sauber, Cain directed Busby to make an investigation of the black market receipts; that thereafter Busby conducted an exhaustive investigation over a period of several months with the assistance of Cain, Sullivan, Huebner and members of his own staff; and that the results of the investigation were summarized in the schedule which he submitted to Revenue Agent Lima when the latter appeared at the corporation's office sometime around the first of August 1948. According to Busby's sum-

mary,* the corporation's unreported receipts from Lubben for the years 1944, 1945 and 1946 totaled about $378,000. The summary also purported to show that with the exception of some $6,000 (which had been reported as income), all the unreported receipts had been expended for the purchase of raw materials. (R. 1942–1944, 2553–2558, 2563–2564, 2801–2805, 2808, 2816, 2838–2839.)

Sauber, testifying as a Government witness, placed his first conversation with Busby on or about March 15, 1948. Sauber's account was as follows: About a week after Busby's initial visit, the latter returned with Cain at which time he was told by Busby and Cain that the corporation's black market receipts were not reported; that the over-ceiling receipts had been paid out for over-the-ceiling purchases, and the balance declared as income, but that there were no records and it would be extremely difficult to reconstruct the figures and prepare accurate amended returns. He advised Cain and Busby to call everyone together who had anything to do with the transactions, reconstruct the receipts and expenditures as accurately as they could, and then request an audit of the returns. He told Cain and Busby he thought it was strictly a "civil case," in view of the facts related to him, but at no time did he tell them that their revelations constituted a timely and sufficient voluntary disclosure. (R. 282–285, 291.) Sauber testified that in the latter

* This schedule was introduced in evidence at the hearing on the motion (R. 189) as Def. Ex. 1 (reproduced in the record at pp. 3091–96) and at the trial (R. 2811) as Government Exs. 186 and 189.

part of April, Cain informed him that the Shotwell officers had followed his advice, that they had a meeting of all the Shotwell personnel who were connected with the black market transactions, that they had prepared the figures, and that Cain wanted to submit the figures and have the returns audited. (R. 286.) Cain allegedly called him several times thereafter to ask when an audit of the company records would be commenced. (R. 287.)

On June 21, 1948, Special Agent Krane visited the corporation's office and requested certain records and information from Gratlund relating to transactions with Lubben. His visit to the corporation office was occasioned by a telephone call from the Treasury Intelligence Unit in New York, which by March 4, 1948, was in possession of information concerning over-ceiling payments and unbilled shipments involving Shotwell and the Lubben companies. (Def. Exs. 5 & 6, R. 3159-3163; R. 334-356.)

Some time after the revenue agents appeared at the corporation's office in the summer of 1948, Cain twice directed Gratlund to destroy the corporation's informal record of Lubben's over-the-ceiling cash payments for a part of the period in question, and his orders were eventually carried out. (R. 785, 1743-1745.) In August 1948, Cain had a conversation with Lubben and the latter's attorney, Davidson, during which he told them that internal revenue agents had visited the Shotwell plant; that Gratlund "like a damn fool" had given them records; and that the agents were working on tax cases involving Lubben, Lub-

ben's former partner William Giglio, and the Shotwell personnel. In August 1948, Cain offered Lubben financial assistance and urged him to leave the country to avoid questioning by the agents. He indicated to Lubben at the time that he was attempting to settle the case through political pressure. (R. 962–974.)

Respondents' defense on the merits was that the total of the over-ceiling payments received from Lubben was much smaller than the amount shown by the prosecution's evidence; that the corporation received the over-ceiling payments from Lubben only from September 1945 to the middle of 1946; and that all the black market receipts had been paid out to obtain raw materials. (R. 2540–2631, 2631–2686.) Cain testified that the purchases by the corporation of raw materials with black market receipts were handled by employees. (R. 262–266, 2577, 2579, 2580, 2583.) He admitted that the figures appearing in Busby's summary purporting to reflect purchases of raw materials with the black market receipts were meaningless "plug" figures. (R. 216–217, 233–234, 258–268.) He also admitted that he never made any effort to find out to whom the money was paid, and that he repeatedly told the revenue agents that he did not want to know to whom the money had been paid. (R. 266, 268.) For his part, Sullivan testified that he never saw any of the black market receipts; that he never received any of the money himself; and that he had no "actual" knowledge of the alleged purchases and knew only what he had been told by others. (R. 2638, 2645, 2650, 2654, 2671.)

II

FINDINGS AND CONCLUSIONS OF THE TRIAL COURT

As previously noted, *supra*, p. 8, the trial court (Judge Nordbye) denied the motion to suppress evidence at the close of the hearing with the observation that it would be inappropriate for the court to express its views prior to trial on the credibility of the witnesses and the good faith of respondents. After the verdict, the court filed a Memorandum Decision (R. 3242-3247) setting forth its findings of fact and conclusions of law in which it held that (R. 3247) "the [respondents] have failed to sustain the burden of proof in establishing that a voluntary disclosure was made by them within the purview of the so-called voluntary disclosure doctrine." Having concluded that no good faith disclosure was made by respondents, the trial court did not find it necessary to make a finding as to the timeliness of the alleged disclosure.

The trial court found as a fact that the so-called disclosure made by respondents was not only devoid of good faith but that respondents, by their "[f]alse statements and fraudulent representations" to Government agents in the guise of a voluntary disclosure, had actually attempted to deceive the Government and to conceal the true facts. (R. 3247.) In so finding, the court pointed to Cain's conduct in "accepting Mr. Lubben's figures of the total amount of overages paid to Shotwell and then fabricating fictitious payments for raw material to offset such receipts" (R. 3245); to the evidence that records "which would be illuminating and helpful in determining the true situation"

with respect to the black market transactions had been destroyed at Cain's direction after the agents began their investigation (R. 3245); to the fact that the figures submitted to the investigating agents which purported to represent expenditures by the corporation for black market purchases "were admittedly fictitious and submitted solely for the purpose of indicating that premium receipts were completely wiped out by the premium payments" (R. 3246); and to the absence of any bona fide attempt by respondents "to determine the amount and the persons to whom any premium payments were made for raw materials" (R. 3245–3246). With respect to this last consideration, the court noted (R. 3246) that throughout the course of the investigation Cain took the position that he would not under any circumstances disclose to whom the payments were made for the alleged black market purchases of raw materials by the corporation and thus "attempted to foreclose any investigation by the Government as to the verity of the claim of such payments."[11]

[11] The trial court also found that the factual situation disclosed to Sauber by Busby and Cain was that (R. 3244) "there were unreported receipts obtained by the Shotwell Company in black market operations which were completely offset by unreported deductions [expenditures] for raw materials". This finding, coupled with Cain's assertions that he had assumed in good faith that expenditures for black market purchases were deductible (and the transactions a wash-out taxwise) and that he was unaware of the Treasury Department's ruling to the contrary until so advised by Busby, led the court to conclude (R. 3244) that here "[t]here was no disclosure of an intentional tax violation or * * * of an intent to defraud the Government". In other words if the representations made by Cain and Busby were true there was (R. 3245) "no disclosure of anything on which these [respondents] could be prosecuted."

Finally, the trial court found as facts that (R. 3246) "no promise of immunity was held out to these [respondents], or any of them, by any representative of the Government when these alleged disclosures were made, or at any other time"; and that "there were no representations by any Government representative which would lead these defendants to believe that the alleged disclosure would be considered a voluntary disclosure within the purview of the voluntary disclosure doctrine."

In interpreting the various public pronouncements of Treasury Department officials on the voluntary disclosure policy, the trial court ruled as a matter of law that (R. 3245)—

> The doctrine necessarily contemplates a contrite taxpayer who confesses his fraud and evidences good faith in aiding and assisting the Government in obtaining the payment of the taxes due.

In the trial court's view (R. 3245), the "basic element of a voluntary disclosure within the enunciated Government policy" is good faith on the part of the taxpayer. That element it found was entirely lacking here. The court noted that (R. 3246) "the evidence convincingly established," as the jury found, that a large part of the black market receipts was never paid out for the purchase of raw materials, as respondents had represented. The court further observed (R. 3247):

> What a travesty it would be if, under such circumstances, immunity should be granted to the defendants because of the alleged disclosure

which had only one purpose and that was to mislead and to misinform the Government agents of the true facts. False statements and fraudulent representations made to Government agents under the pretense of a voluntary disclosure can never constitute the basis for immunity from criminal prosecution under any possible interpretation of the so-called voluntary disclosure doctrine.

III

THE DECISION BELOW

The court below, with Judge Lindley dissenting, reversed the judgments of conviction on the ground that the trial court erred in denying respondents' motion to suppress evidence, and it remanded the case for a new trial with instructions to sustain repondents' motion. (R. 3361–3364.) The majority held (R. 3354) that respondents made a "valid voluntary disclosure"; that they did so "in reliance upon promises of immunity"; that the evidence thus obtained by the Government stands on the same footing as an oral or written confession induced by such a promise; and that the use of such evidence at the trial was a violation of respondents' privilege against self-incrimination as guaranteed by the Fifth Amendment to the Constitution. Thus, the court below found that respondents "did disclose the *facts*" (R. 3351); that they "frankly outlined" the nature of the omissions from the returns (R. 3352); and that they "cooperated [with Treasury agents] to the extent that they were able, and in complete compliance with the [voluntary disclosure] policy of the department" (R.

3351). Further, the court held that the disclosure was "accepted by the revenue officials" as a voluntary disclosure within the announced policy of the Treasury Department (R. 3352–3353); that at all material times respondents "were led to believe by the Government representatives that the course which they were pursuing would avert their criminal prosecution" (R. 3352); and that "responsible government officials, from cabinet level to local level, had represented to [respondents] that their disclosure would result in immunity from criminal prosecution" (R. 3352–3353). On the basis of these findings, the majority concluded that (R. 3354) "[respondents] made a valid voluntary disclosure in reliance upon promises of immunity".

The dissent by Judge Lindley (R. 3356–3358) was based mainly on the ground that the majority, in holding that respondents made a valid voluntary disclosure, embarked on a trial *de novo* of the factual issues raised by the motion rather than according the requisite weight to the trial court's findings of fact which, in Judge Lindley's opinion, were "amply supported" by the evidence and therefore unassailable on review.[11] Thus, although the majority prefaced

[11] Judge Lindley also took issue with the majority for rejecting the trial court's interpretation of the Treasury Department's voluntary disclosure policy while at the same time failing (R. 3355) "to define clearly its interpretation of the * * * policy." He expressed the conviction that (R. 3360) "the [trial] court's interpretation of the * * * [policy] as requiring such a complete disclosure and good faith effort as to enable the internal revenue agents to assess the additional tax due is a correct interpretation of the offer held out to taxpayers in the Treasury policy statements."

its summary of the evidentiary facts (R. 3343) with the comment that (R. 3343) "[t]he following is a statement of the facts proved, including only those facts shown by the government's evidence wherever there was a conflict." Judge Lindley noted that the majority's summary of evidentiary facts (R. 3359) "tells only a part of the story on which the trial court's findings are based". Judge Lindley pointed out (R. 3359), specifically, that the majority failed to mention the fact that Sauber was not advised by respondents that, in addition to the black-market receipts, there were other wholly unrecorded sales by the corporation (the "unbilled shipments", see pp. 10-11, *supra*); that the only records made by the corporation reflecting black market transactions were destroyed at Cain's direction after the investigation was started;[15] and that the summaries which respondents submitted to the agents purporting to show expenditures by the corporation for the purchase of raw materials on the black market were admittedly fictitious; with respondents maintaining that hundreds of thousands of dollars were paid out by the corporation to unidentified men without the benefit of any receipts. He stated that the majority also ignored the trial court's finding that the respondents' account of black market expenditures was, in large part, a fabrication and that the only purpose of their disclosure was to mislead the Government and conceal the true facts. These and the other critical findings of the trial court were, in Judge

[15] Judge Lindley mistakenly places this destruction of records before the beginning of the investigation. (See R. 785, 1743-1745.)

Lindley's opinion (R. 3360), "adequately supported by the evidence". Accordingly, he concluded (R. 3360) that it was not within the "province [of the reviewing court] to second-guess the trial court on factual questions." Judge Lindley's dissent was summed up in his observation that (R. 3359):

> The point to be stressed is that on the record before us we cannot say that the evidence does not support the finding of the trial court that no sufficient disclosure was made. We cannot say that the court's conclusion that "False statements and fraudulent representations made to Government agents under the pretense of a voluntary disclosure can never constitute the basis for immunity from criminal prosecution under any possible interpretation of the so-called voluntary disclosure doctrine" is an erroneous legal statement or that the hypothecated facts included in this statement are not descriptive of the proofs made in this case.

In addition to finding that respondents made a bona fide disclosure, the majority below also found (R. 3354) that "[t]he disclosure was timely." In so doing, the majority observed that (R. 3353–54) "the facts in evidence show that when the disclosure was made, no investigation involving the over-ceiling income of Shotwell during the taxable years had been started or even suggested or contemplated by the government." As previously noted, *supra*, p. 18, Judge Nordbye had specifically refrained from making a finding as to the timeliness of the disclosure.

IV

THE NEWLY DISCOVERED EVIDENCE

As set forth in the supplement to the Government's motion to remand (p. 3), subsequent to the filing of the petition for certiorari, and as a result of an investigation initiated by the National Office of the Internal Revenue Service which precipitated a grand jury inquiry,[16] new evidence came to light which is highly relevant to the issues of the timeliness and good faith of respondents' "voluntary disclosure". The Government believes that this evidence will support the charge[17] that perjured testimony with reference to the so-called disclosure was given at the trial of these proceedings by respondents Cain and Sullivan. This evidence indicates, *inter alia*, that no move was made by respondents to disclose the corporation's unreported black market receipts prior to Special Agent Krane's visit to the corporation's plant on June 21, 1948. (See p. 16, *supra*.) Further, this evidence, we submit, conclusively shows that the alleged disclosure by respondents was not only devoid of good faith and incomplete but was designed to mislead the Government and conceal the true facts.

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[16] Certain aspects of this case have been investigated by The April 1956 Term Grand Jury for the Northern District of Illinois which returned the indictment referred to hereinafter.

[17] On February 27, 1957, an indictment was returned in the United States District Court for the Northern District of Illinois charging, among other things, that Cain and Sullivan gave perjured testimony at the trial of this case. *United States* v. *Sullivan, et al.*, No. 57 CR 149. See fn. 23, pp. 30–31, *infra*.

While the Government's petition and the respondents' cross-petition for certiorari were pending, respondent Huebner[18] and others voluntarily came forward with new evidence which relates to both the timeliness and the good faith of the respondents' alleged disclosure.

As previously noted, *supra*, p. 12, it was Busby's testimony that he first learned of the corporation's unreported black market receipts in the course of conversation with Gratlund during their trip to New York early in January 1948; that immediately upon his return to Chicago he discussed the matter with Cain and Sullivan who told him the unreported receipts were washed out by unreported expenditures for raw materials; that he recommended disclosing the omissions to the Treasury Department; and that, at the direction of Cain and Sullivan, he disclosed the whole affair to Sauber in a series of conferences beginning in the latter part of January 1948, at one or more of which conferences he was accompanied by Cain. He also testified that Sauber suggested that respondents gather together and summarize all available data on the black market transactions for submission to the agents who would investigate the returns; and that he and his staff, with the assistance of Gratlund, Huebner and Cain, immediately began a long investigation in order to assemble the data summarized in the respondents' tentative computation of unreported black market receipts and expenditures introduced at the suppression

[18] See Affidavit of Huebner attached to Supplement To Motion To Remand, App. 7, 10. Huebner did not testify at either the suppression hearing or at the trial.

hearing and later at the trial. Cain and Sauber gave similar testimony, except that Sauber fixed the time of Busby's first visit at about the middle of March 1948. Respondents recognize that the only evidence as to the date of the alleged disclosure is the testimony of Cain, Busby and Sauber.[19] (Respondents' Answer to Motion (Amended) To Remand 2-3.)

If this case is remanded to the trial court, Grafflund will testify[20] that he did not discuss the black market transactions with Busby on the trip to New York, and that it was not until a few days after Agent Krane's initial visit to the plant in June 1948, that he related to Busby what he knew about the black market dealings, at which time Busby displayed surprise and complete ignorance of these transactions. Furthermore both Grafflund and Huebner will testify that they did not assist Cain, Busby or any member of the latter's staff in assembling data relative to the black market transactions at any time prior to Agent Krane's visit to the plant,[21] and that the black market payments received from Lubben in fact were reconstructed at a meeting held in the middle of July 1948. In addition, Huebner and Grafflund will testify that, although they were summoned to a meeting at Cain's

[19] It appears evident from Judge Nordbye's memorandum (R. 3242 17) that he found Cain's testimony, at least in part, unworthy of belief.

[20] See Affidavit of H. Stanley Grafflund, lodged with the Clerk of this Court, Aug. 19, 1957; other aspects of the newly discovered evidence are outlined in the affidavits attached to the Motion to Remand (Amended), Appendix, pp. 7-23.

[21] Busby testified that Huebner and Grafflund were two of the principal people who assisted in this work. (R. 182, 185.)

house early in July 1948 to discuss the implications of Special Agent Krane's visit to the plant requesting records relating to the corporation's transactions with Lubben, there was nothing said at the meeting about a voluntary disclosure having been made months earlier. Moreover, Huebner and Graflund will testify that at no time prior to the middle of July 1948 were they ever advised or led to believe by either Cain or Sullivan that the corporation's unreported black market receipts had been disclosed to the Treasury Department. Huebner's affidavit (Supplement To Motion To Remand, App. 7–10) relates, and he will testify, that it was not until late July or early August 1948 that Cain first mentioned to him that a voluntary disclosure had been made to Sauber, at which time he was told by Cain that June 15 had been agreed upon as the date of the disclosure. Also, that during the suppression hearing, after he had heard Sauber testify, he said to Cain (*id.* at p. 10) "I thought the voluntary disclosure date was supposed to be June 15, 1948"; whereupon Cain replied "Ssshhh. There is nobody that knows anything about this. Keep quiet."

As previously noted, *supra*, pp. 10–11, at the trial the prosecution's evidence showed that in 1945 and continuing through 1946, the corporation received more than $450,000 in unreported income from Lubben.[22] Cain, on the other hand, testified that

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[22] Respondents admitted, at least tentatively, the receipt of almost $400,000 in unreported income from Lubben during the years 1944, 1945 and 1946 when they submitted the summary, referred to herein as Busby's summary, to Revenue Agent Lima sometime after July 30, 1948. This schedule was introduced in evidence at the hearing on the motion (R. 189) as Def. Ex. 1

the total of the black market receipts from Lubben was only about a third of the amount shown by the Government's evidence; that the premium payments were received for only a limited period—the latter part of 1945 through the middle of 1946; and that substantially all of these receipts were paid out by the corporation to unidentified men for the purchase of raw materials. Huebner states in his affidavit and will now testify that (Supplement To Motion To Remand, App. 7–8):

> I know; from my own knowledge, that over-ceiling premium payments in currency were received by Shotwell from David G. Lubben during the period from November, 1944, to sometime in December, 1946, that none of these payments were recorded on Shotwell's books and that Cain and Sullivan were aware of these facts as they occurred. Cain and Sullivan testified that these payments were received only during the period beginning in the late summer of 1945 and ending in July, 1946. I know of my own knowledge that this testimony was untrue.

Furthermore, Huebner will testify that between $300,000 and $400,000 of the corporation's black market receipts from Lubben was not paid out for the purchase of raw materials on the black market but instead was diverted from the corporation and divided among Cain, Sullivan and himself.

Further, Huebner and Grafund will testify that Cain told them in the latter part of July 1948, before

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(reproduced in the record at pp. 3091–3096) and at the trial (R. 2811) as Government Exs. 186 and 189.

Busby's summary had been submitted to any Internal Revenue Service personnel, that he could settle the tax case for about $20,000. Huebner will also testify that shortly thereafter Cain asked him for $10,000 in cash which Cain said he needed to "fix" the case; that in the last week of July, he gave Cain $5,000 in cash; that in the early part of August 1948, Cain told him that he had settled the case for a tax deficiency of $20,000; that shortly thereafter, he gave Cain the other $5,000 in cash; and that Cain told him he had turned the money over to someone to take care of the tax "fix". In this connection, Revenue Agent Lima will testify that on July 30, 1948, he was instructed by his Group Supervisor Johnson to make an immediate audit of the corporation's 1946 return, which audit he commenced the first week of August; that thereafter he was instructed by Johnson to allow over-ceiling purchases totaling more than $300,000 shown on Busby's summary, although the alleged purchases were wholly unsubstantiated and their allowance was contrary to the then policy of the Service; and that in accordance with Johnson's instructions, he prepared a revenue agent's report showing a tax deficiency for 1945 and 1946 of about $20,000, which report he destroyed at Johnson's direction in September 1948, after the Intelligence Unit of the Service had made inquiries about the case.

[fn. 17] This and other evidence in the Government's possession forms the basis for the indictment returned in the United States District Court for the Northern District of Illinois on February 27, 1957, which, in addition to charging Cain and Sullivan with perjury (see fn. 17, p. 25, *supra*) charges that Sullivan, Cain, Busby, Sauber and John conspired to de-

The Government respectfully submits that this Court should, in the interests of justice, and in the exercise of its power under 28 U. S. C., Section 2106 (*supra*, p. 3),[21] vacate the judgments of the Court of Appeals and remand these proceedings to the trial court with directions to take further evidence and make supplementary findings on respondents' motion to suppress. The Government recognizes that its motion is unusual. We are, however, confronted here with unusual circumstances which require exceptional action to safeguard the integrity of the judicial process. These larger considerations prompted the Government to move this Court for a remand while at the same time reiterating its firm conviction that the evidence now of record is more than adequate to support the trial court's findings of fact.

As the chronological statement of the history of this litigation indicates (Appendix, *infra*, pp. 40-46), the Government has acted diligently in response to the new facts uncovered by the Internal Revenue Service investigation subsequent to the trial on the merits and the filing of the petition for certiorari. As the chronology further discloses, except to the extent that it has been thwarted by the dilatory tactics of the respondents, the Government has endeavored to bring the true facts to light as promptly as possible. The newly discovered facts have a vital bearing on the

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fraud the United States and to evade taxes. *United States* v. *Sullivan, et al.*, No. 57 CR 149.

[21] Cf. *Yates* v. *United States*, 354 U. S. 298, 327.

issues presented by the motion to suppress and are such that, in the unusual circumstances of this case, a remand to the district court is warranted.

I

THE NEW EVIDENCE HAS A VITAL BEARING ON THE ISSUES PRESENTED BY THE MOTION TO SUPPRESS

The new evidence summarized above, at pages 25–30, indicates that perjured testimony, all of which was designed to aid the respondents, was given at the suppression hearing by respondent Cain, by Busby, as a defense witness, and by Sauber, as a Government witness, and at the trial by respondents Cain and Sullivan and by Busby both as a defense and a Government witness. The new evidence points to the conclusion that what respondents seek to characterize as a timely voluntary disclosure was in truth no disclosure at all but a further step in a conspiracy to defraud the United States and to defeat and evade taxes.

Respondents' motion to suppress was predicated on the theory that there had been a valid voluntary disclosure which, under the then policy of the Treasury Department (see *supra*, pp. 5–6), estopped the Government from instituting and maintaining these proceedings (R. 10–13). But two elements must be present before an accused can invoke this policy:—(1) the disclosure must be timely, *i. e.*, it must take place, as the Court of Appeals stated (R. 3351), before "the revenue agents get the scent and are in pursuit of the miscreant", and (2) it must be a full, good-faith and voluntary disclosure of the operative facts which give rise to the additional liability of the taxpayer. The trial judge found that there had been no

good-faith disclosure and explicitly refrained from making "any finding as to the exact date when the Government first commenced its investigation of the Shotwell Company's income taxes for the years in question" (R. 3247). As we have seen, the Court of Appeals, in reversing, not only substituted its findings and held that there was a "good faith disclosure, but made an affirmative finding that the disclosure was timely." (R. 3354.) The newly discovered evidence goes to the heart of both issues, *i. e.*, timeliness and good faith, and, we submit, conclusively shows that both are absent here.

The new evidence indicates that the testimony which placed the date of the so-called disclosure in January or March 1948 was perjurious testimony of respondents and of Busby and Sauber.[26] In fact, the so-called disclosure took place in July 1948.[27] This was subsequent to the occasion (on June 21, 1948) when Special Agent Krane called at the corporation office and requested, *inter alia*, records relating to transactions with Lubben. See p. 16, *supra*.

The significance of this new evidence is readily apparent. Not only has there been no finding as to timeliness by the proper fact-finding tribunal, but the

[26] We urged in our Petition for Certiorari (pp. 23-24) that the case should at least have been remanded by the Court of Appeals to permit the court of first instance to pass upon this crucial issue, and we adhere to the position that, apart from the newly discovered evidence, this would have been the proper procedure. We urge that, in the light of the new evidence, remand to the district court is *a fortiori* warranted.

[27] See fn. 17, *infra*, p. 25.

[27] The new evidence does not merely impeach testimony as to the time of the alleged disclosure but affirmatively shows that it did not take place until this later date.

Court of Appeals, which erroneously undertook to make a finding on this issue, did so on the basis of a record now shown to have been tainted by the respondents and their co-conspirators. A finding based on a record so corrupted cannot be permitted to stand.

Respondents contend that the so-called 'disclosure would have been timely even if made in July. (Answer to Motion (Amended) to Remand (hereafter referred to as "Answer") 4–7, 19–24.) They predicate this contention on the assertion that no investigation directed specifically at respondents had been initiated by July 1948, and that under the so-called Wenchel doctrine (see Answer 20–21) taxpayers could avail themselves of the voluntary disclosure policy until such an investigation was formally launched. We submit, however, that this is not the proper forum to pass, in the first instance, on this and other aspects of the "timeliness" issue. It is for the trial court, not this Court, to determine what the exact stage of the Government's investigation was as of July 1948, and further, whether an investigation which had proceeded thus far served to end the *locus poenitentiae* afforded taxpayers under the voluntary disclosure policy. These are matters into which the district court may fully inquire on remand after hearing the newly discovered evidence, discounting such of the testimony previously adduced as may be found by it to have been perjurious.

Since respondents had the burden of proof on the motion to suppress, the Government would clearly prevail if no more were to occur on the remand than the striking from the record of the testimony as to the

time of disclosure if it is found to have been perjurious. However, since the district court has never passed on the question of timeliness, and no tribunal has considered this issue on a record cleansed of perjury and amplified by the newly discovered matters, we urge that the case be remanded to the district court for a full hearing enabling the parties to present any new evidence on the timeliness of the alleged voluntary disclosure.

With respect to the nature and good faith of the alleged disclosure, apart from the question of when it was made, the influence of the perjurious testimony on the result reached by the Court of Appeals appears clear. In reversing the district court, the Court of Appeals substituted its findings of fact which of necessity were predicated on the record as it then stood, devoid of the newly discovered facts which we have summarized *supra*, at pp. 25-30. In view of the extensive development of the facts in the statement above, we do not believe that the point need be labored that the new evidence has a direct and vital bearing on the question whether there has ever been a full good-faith voluntary disclosure. The evidence which the Government offers to present on remand would rather show that respondents, believing that their case had been successfully "fixed" (see pp. 29-30, *supra*), went through the mechanics of a disclosure which was really

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[*] In fact, the newly discovered evidence supports the conclusion that the question of timeliness discussed *supra* is not actually presented by this case, since it appears that there has at no time been any disclosure which would satisfy any reasonable interpretation of the voluntary disclosure policy.

but a further step in a scheme to defraud the Government and which actually concealed the corporation's true tax liability.

It would be contrary to the interests of justice to permit the opinion of the Court of Appeals, misled by respondents' perjurious testimony, to stand uncorrected. Rather, this case should be remanded for a further hearing to the district court so that there may be a full inquiry into the circumstances of the alleged disclosure, its extent, timeliness, and good faith. Of course, if after such a hearing the district court should adhere to its denial of the motion to suppress, respondents may again bring the matter to the Court of Appeals which can then pass upon the matter in the light of a full record, amplified by the new evidence and cleansed of the taint of perjury.

II

IN VIEW OF THE UNUSUAL CIRCUMSTANCES OF THIS CASE, THE MOTION TO REMAND SHOULD BE GRANTED

Contrary to respondents' assertion (Answer 13–16), the Government is not seeking a new trial, and authorities with respect to the granting of retrials on the grounds of newly discovered evidence have no application here. The considerations which are relevant when a defendant seeks to have a verdict set aside because of new evidence tending to negate guilt are entirely inapposite here. In this case, the newly discovered evidence supports the conviction—which was set aside by the Court of Appeals—and all of the perjury adduced below was in support of a defense contention which was accepted by the Court of Appeals.

A real concern in the usual new evidence case is whether granting a retrial would, in effect, vest the power to set aside the conviction, not in the court, but in those proffering the evidence. For example, the courts consider whether such action would enable and encourage defendants to join with prosecution witnesses in automatically setting aside a conviction by producing a "recantation". See *People* v. *Shilitano*, 218 N. Y. 161, 168. No such considerations obtain where, as here, the newly discovered evidence serves to preserve rather than vitiate the verdict of the jury.

Moreover, this is clearly not a case where one party, having failed to convince a court of the soundness of his position, seeks a remand merely to bolster his case by additional evidence. Rather, what the Government in essence seeks here is an opportunity to have excised from the record respondents' perjury. As noted *supra* at pp. 34–35, if no more than this took place on remand, the Government would prevail. Put, if the Court of Appeals decision reversing the conviction and remanding with instructions to grant the motion to suppress is not vacated, respondents' perjury will have achieved its desired effect.

Obviously respondents should not be allowed to profit from their perjury. It is in the best interests of justice, after a full development of the facts by the proper tribunal, to place the respondents, as near as may be, in the position which they would have occupied had there been no perjury. Therefore, the conviction obtained not because of, but despite, the perjury, should not be set aside unless the record, cleansed of the perjury, cannot support the conviction. The

sole basis for the reversal of the conviction was the conclusion of the Court of Appeals that the motion to suppress should have been granted. If the newly discovered evidence demonstrates that the trial judge's ruling was in fact a correct one, it is apparent that nothing was presented to the jury by the Government which would mar the verdict and there is no need for the new trial ordered by the Court of Appeals."

The facts and circumstances of this case make apposite the observation of this Court in *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 124, reiterated in *Mesarosh* v. *United States*, 352 U. S. 1, 14, that:

> The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. *See McNabb* v. *United States*, 318 U. S. 332. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doings of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.

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[20] "The issues of fact and law raised by the alleged voluntary disclosure, in so far as they related to the respondents' motions to dismiss the indictment and suppress the evidence obtained from such alleged disclosure, were decided solely by the trial judge after a pre-trial hearing. (See Petition for Certiorari, 6–7.) These issues, and the evidence bearing on them, were not submitted to the jury, except that the jury was allowed to consider the evidence as to the alleged disclosure in so far as it threw light upon the issue of wilfulness as an element of the substantive offense, *i. e.*, the defendants' "intent" and "good faith" (R. 2968–2970).

Where, as here, all of the perjury related to a defense contention and striking such testimony would not in any wise weaken the Government's case, it is submitted that "the untainted administration of justice" would appear to require a remand of this case to the trial court rather than a new trial. Such remand of course would preserve to the parties the right to seek appellate review of the rulings of the district court, made upon the amplified record.

CONCLUSION

For the reasons stated, the Government respectfully submits that this Court should, in the interest of justice, vacate the judgments of the Court of Appeals and remand these proceedings to the trial court with instructions to take further evidence and make supplementary findings on respondents' preliminary motion to suppress. Ascertainment of where the whole truth lies with respect to the alleged disclosure is a function, we believe, for the trial court in the first instance. Cf. *Remmer* v. *United States*, 350 U. S. 377, 379-380; 347 U. S. 227.

Respectfully submitted.

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AUGUST 1957.

APPENDIX

Chronology of Litigation

Mar. 14, 1952: Indictment returned.

June 24, 1952: Arraignment.

Oct. 6, 1952: Motion to suppress evidence filed.

Nov. 12, 13, 21, 1952: Hearing on motion to suppress.

Nov. 21, 1952: Order entered denying motion to suppress evidence.

Sept. 15 through Oct. 16, 1953: Trial on the merits.

Nov. 30, 1953: Memorandum Decision denying motion to suppress filed.

Dec. 3, 14, 1953: Notices of appeal filed.

Apr. 29, 1955: National Office of Internal Revenue Service commenced full scale investigation of the administrative handling of the Shotwell Manufacturing Company and related income tax cases for years 1944 through 1949. (See Stein and Yadon affidavits, Motion to Remand (Amended), pp. 7-13.)

May 5, 1955: Court of Appeals heard oral argument.

June 15, 1955: Decision of Court of Appeals entered reversing judgments of conviction and remanding for a new trial with instructions to sustain respondents' motion to suppress.

July 30, 1955: Petition for rehearing filed by Government and denied August 18, 1955.

Sept. 16, 1955: Order entered by Mr. Justice Reed extending time within which to petition for writ of certiorari to and including October 17, 1955.

Oct. 17, 1955: Petition for writ of certiorari and conditional cross-petition for writ of certiorari filed.

Nov. 30, 1955: Reply Brief for the United States filed.

Dec. 1, 1955: Department of Justice received letter from Chief Counsel, Internal Revenue Service, recommending grand jury investigation of possible violations of Titles 18 and 26 of the United States Code.

Dec. 6, 1955: Solicitor General, in a letter to the Clerk, advised this Court that an investigation by Internal Revenue Service was in progress and that upon receipt of a full report the Government expected to file in this Court a motion to remand the case to the District Court. Accordingly, the Solicitor General requested this Court to defer action on petitions.

January–March, 1956: Department of Justice reviewed files, determined to institute grand jury proceedings and assigned case to two special attorneys.

Apr. 9, 1956: Grand jury investigation commenced to determine whether various indictable offenses may have been committed, including perjury, obstruction of justice and conspiracy to evade taxes, by respondents and others.

Apr. 10, 1956: A subpoena was issued to Leon J. Busby, the Shotwell accountant, directing him to produce numerous books and papers before The April 1956 Term Grand Jury for the Northern District of Illinois.

Apr. 11, 1956: Respondents filed a Complaint and Petition in the District Court for the Northern District of Illinois praying an injunction restraining the Government's attorneys from presenting to the grand jury any of the evidence which the Court of Appeals ordered suppressed in the case of *United States* v. *The Shotwell Manufacturing Company, et al.*, 225 F. 2d 394.

Apr. 12, 1956: Motion to dismiss respondents' Complaint and Petition filed by the Government.

Apr. 12, 1956: Respondents' motion granted to reassign Complaint and Petition to Judge Perry before whom there was pending a civil action attacking the validity of a jeopardy assessment against the Shotwell Manufacturing Company.

Apr. 13, 1956: Government filed petition with the Executive Committee of the United States District Court for the Northern District of Illinois requesting that the Complaint and Petition be assigned to the judge regularly assigned to empaneling and instructing the grand juries, and on the same date the case was reassigned to Judge Barnes.

Apr. 17, 1956: District Court, after hearing argument, granted the Government's motion and dismissed the Complaint and Petition whereupon respondents noted an appeal.

Apr. 18, 1956: Court of Appeals set May 2, 1956, as date for oral argument and stayed the force and effect of the subpoena duces tecum issued to Leon J. Busby or any other subpoena of like tenor.

May 11, 1956: Court of Appeals affirmed the judgment of the District Court dismissing the Complaint and Petition. *Homan Manufacturing Company, et al.* v. *Russo, et al.*, 233 F. 2d 547.

June 1, 1956: Solicitor General, in a letter to the Clerk, advised this Court of the developments in connection with the grand jury investigation and requested the Court to continue to withhold action on the petitions.

June 6, 1956: Court of Appeals denied respondents' Petition for Rehearing of decision affirming District Court's dismissal of the Complaint and Petition.

June 7, 1956: Motion to set aside and vacate order entered by Court of Appeals on April 18, 1956, filed by the Government.

June 11, 1956: This Court granted the Solicitor General's motion to defer consideration of the petitions for writ of certiorari. 351 U. S. 980.

July 18, 1956: Respondents and others filed petition in the District Court entitled *In The Matter Of The April 1956 Term Grand Jury* praying for the protective power of the District Court against alleged misuse of the grand jury and requesting that the grand jury minutes be produced in open court; that the grand jurors be interrogated by the court; that counsel for the grand jury be admonished or disciplined; and that certain Treasury agents be punished for contempt. Counsel for the grand jury orally moved to dismiss, and, after an immediate hearing, the court granted the motion to dismiss and denied with prejudice the relief prayed for in the petition.

July 27, 1956: Respondents and others filed a notice of appeal from the District Court's order of July 18, 1956.

Aug. 21, 22, 28, 29, 30, 1956: H. Stanley Grafund and Frank J. Huebner appeared before the grand jury and series of conferences with Government attorneys continued.

Sept. 10, 1956: Respondents and others filed Emergency Motion with the Court of Appeals praying the issuance of a temporary order to the Honorable John P. Barnes, District Court Judge, directing him forthwith to instruct the grand jury, and its counsel, that said grand jury can consider no matters involving respondents and others until the Court of Appeals shall enter its order.

Sept. 10, 1956: Motion to Dismiss Appeal from District Court's order of July 18, 1956, filed by the Government.

Sept. 12, 1956: Order of Court of Appeals entered, giving respondents and others three days to file answer to Government's motion to dismiss.

Sept. 25, 1956: Court of Appeals ordered oral argument, set for October 17, 1956, on merits of appeal from District Court's order of July 18, 1956.

October 15, 1956: Motion to Remand filed by Government in this Court together with affidavits of Stein, Yaden, Howard and Russo.

Oct. 25, 1956: Respondents and others moved the Court of Appeals to withhold its decision on the above appeal pending the Court's examination of matters set forth in affidavits attached to the motion and any further investigation the Court should deem appropriate and for leave to file instanter said affidavits.

Oct. 25, 1956: Court of Appeals, reserving its ruling on the above motion of respondents and others, ordered that the Government may file objections to the motion to reserve decision on or before October 29, 1956.

Oct. 26, 1956: Government moved to extend time to file objections.

Oct. 29, 1956: Respondents, and others, filed Conditional Objections to Request for Extension of Time.

Oct. 29, 1956: Order entered extending time to file objections to motion to reserve decision to and including November 1, 1956.

Oct. 31, 1956: Government moved for a further extension of time to file objections.

Nov. 2, 1956: Motions of respondents and others, filed on October 25, 1956, denied by Court of Appeals.

Nov. 13, 1956: Decision of the Court of Appeals reversing the District Court's order of July 18, 1956, and remanding with directions. *In The Matter Of The April 1956 Term Grand Jury*, 239 F. 2d 263.

Nov. 15, 1956: Motion to Remand (Amended) filed by Government in this Court together with affidavits of Stein, Yaden, Howard, Russo, and McNelis.

Nov. 28, 1956: Government filed a motion to modify and clarify the above opinion of the Court of Appeals.

Dec. 5, 1956: Respondents' answer to Government's motion to modify and clarify opinion by Court of Appeals filed.

Dec. 10, 1956: Government's motion to modify and clarify opinion denied by Court of Appeals.

Dec. 11, 1956: Government filed motion in Court of Appeals for stay of mandate re decision entered November 13, 1956, *In The Matter Of The April 1956 Term Grand Jury*.

Dec. 14, 1956: Government's motion for stay of mandate for thirty days granted by Court of Appeals.

Dec. 24, 1956: Respondents' Answer To Motion (Amended) To Remand filed in this Court.

Dec. 31, 1956: Motion of Frank J. Huebner To Withdraw From Opposition To Government's Petition For Certiorari, Motion To Withdraw From Conditional Cross-Petition For Certiorari, And Consent To Government's Motion To Remand, filed in this Court.

Jan. 7, 1957: Motion of Harold A. Smith and others for leave to withdraw as counsel for Frank J. Huebner filed in this Court.

Jan. 9, 1957: Government's Supplement To Motion To Remand filed in this Court together with affidavit of Frank J. Huebner.

Jan. 23, 1957: Respondents' Reply To Supplement To Motion To Remand and their Motion That Conditional Cross-Petition For Certiorari Be Treated As An Unconditional Cross-Petition filed in this Court.

Feb. 6, 1957: Mandate of Court Appeals issued, *In The Matter Of The April 1956 Term Grand Jury.*

Feb. 14, 1957: Interrogatories served upon Vincent P. Russo, Special Attorney, Department of Justice, counsel for The April 1956 Term Grand Jury.

Feb. 20, 1957: H. Stanley Gratlund again testified before grand jury.

Feb. 25, 1957: Motion to strike interrogatories filed in District Court.

Feb. 25, 1957: This Court granted the Government's petition for certiorari limited to the issues raised in the amended motion to remand and supplement thereto and the respondents' answer to the amended motion to remand, and denied respondents' cross-petition for certiorari. It also granted the motions of Frank J. Huebner and his counsel.

Feb. 27, 1957: Indictment returned against respondents Cain and Sullivan and others by the April 1956 Term Grand Jury.

Aug. 19, 1957: Gratlund affidavit lodged with the Clerk of this Court.